STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 13, 2004
v	No. 245890 Genesee Circuit Court
ANTHONY ANTWAN JONES, Defendant-Appellant.	LC No. 02-009479-FC

Before: O'Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), possession of a firearm by a person convicted of a felony, MCL 750.224f, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a habitual offender, third offense, MCL 769.11, to 264 to 450 months in prison for the armed robbery conviction, 264 to 480 months in prison for the first-degree home invasion conviction, 60 to 120 months in prison for the felon in possession of a firearm conviction, sixty months to ninety-six months in prison for the felonious assault conviction, and two years in prison for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that the trial court erred by informing the jury that defendant was a convicted felon when the parties had stipulated that defendant would not be referred to as a convicted felon. We disagree.

To preserve an issue for appeal, it must be raised before and addressed by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Because defendant did not object to the trial court's reading of the information in the lower court, defendant has failed to preserve this issue for appeal, and, therefore, we review this issue for a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

During voir dire, the prosecutor and defense counsel agreed to refrain from referring to defendant as a convicted felon in front of the jury. Immediately after the stipulation, the trial court read the information to the prospective jurors, which stated, "Count Three, Weapons, Firearm, Possession by a Felon, did possess and/or use and/or transport and/or carry a firearm when ineligible to do so." Defendant neither objected to the reading of the information nor

requested a curative instruction. Now, on appeal, defendant claims that the trial court erred by informing the jurors that defendant was a convicted felon in violation of the stipulation.

MCR 6.412(B) provides that "the court should give the prospective jurors appropriate preliminary instructions . . . ." The comment to MCR 6.412(B) states that the appropriate preliminary instructions may be found in the Michigan Criminal Jury Instructions. According to CJI2d 1.8, an information is read in every criminal trial so that the defendant and jury can hear the charges. CJI2d 1.8 instructs the court to read the information. CJI2d 1.8 further instructs the jury that the information is not evidence of defendant's guilt. Here, the trial court specifically stated:

> Now, I want you to know the defendant has plead not guilty to these charges, and just because I read this information to you doesn't mean a thing. All this is [sic] a piece of paper. It is not evidence, it's not proof. We read an information in every trial, the reason we have them is because in the old days sometimes when the king didn't like you he would have you arrested and not tell you why. It's kind of hard to defend yourself if you don't know what you're charged with . . . . So I read the information, but it's not proof.
>
> And you're not to think he is guilty of something just because I read this to you and you're not to think he is guilty of something because I have read five charges to you, and that's because a person in our country who is accused of a crime has the right to be presumed to be innocent.

The trial court did not err in adhering to MCR 6.412(B) and reading the information. Defendant claims that the trial court informed the jurors that defendant was a convicted felon, however, there was no evidence of this on the record. The trial court merely stated that count three was firearm possession by a felon. In any event, defendant failed to object to the trial court's reading of the information, and, therefore, must show that the reading of the information prejudiced him. *Carines*, *supra* at 763. We find that any prejudice, resulting from the trial court's reading of the information, was eliminated when the trial court instructed the jury that defendant pleaded not guilty to the charges and that the information was not evidence and should not be used in determining defendant's guilt. Therefore, defendant has failed to show a plain error affecting his substantial rights.

Defendant's second issue is that the trial court abused its discretion by allowing the prosecutor to reintroduce testimony in his case-in-chief as rebuttal evidence. We disagree. The decision to allow a witness to be recalled is a matter within the discretion of the trial court. *People v Barnard*, 93 Mich App 590, 592; 286 NW2d 870 (1979). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

Flint Police Officer Brian Murphree, one of the officers that responded to the robbery on January 23, 2002, testified that defendant was discovered in the motel room with a gun underneath his forearm. It was determined that the gun found under defendant's arm was also the gun that was used to fire a shot at the bathroom door. Thereafter, defense counsel questioned Sergeant Jeff Fray, the officer in charge of defendant's case, concerning the police department's

failure to perform an atomic absorption gunpowder residue test on defendant to determine whether defendant had gunpowder residue on his hands and clothing. The prosecutor then recalled Officer Murphree to testify that the gun was discovered under defendant's arm and, therefore, an atomic absorption gunpowder residue test was not necessary.

Here, Officer Murphree was recalled, during the prosecutor's case-in-chief, for the purpose of refuting defense counsel's inference that the police were incompetent for failing to order an atomic absorption gunpowder residue test. Since the prosecutor had not yet rested, defendant incorrectly classifies Officer Murphree's testimony as rebuttal evidence. See *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

Because this issue deals with the recalling of a witness, rather than the admission of rebuttal evidence, we must determine whether the trial court abused its discretion in allowing the prosecutor to recall Officer Murphree during its case-in-chief. Once defendant began cross-examining Sergeant Fray regarding the police department's failure to conduct an atomic absorption gunpowder residue analysis test, he opened the door to the presentation of further evidence bearing on the reasons the test was not ordered. The evidence introduced by Officer Murphree directly responded to the impressions raised by defendant during cross-examination of Sergeant Fray. Allowing the prosecutor to recall Officer Murphree was within the trial court's discretion, and that discretion was not abused.

Defendant's third issue is that the prosecutor violated his due process rights by failing to order an atomic absorption gunpowder residue analysis test to determine whether defendant had discharged a firearm during the robbery. We disagree. Defendant has failed to preserve the issue for review, and, therefore, we will review the issue for a plain error affecting defendant's substantial rights. *Grant, supra* at 546.

Defendant asserts that he was denied a potential defense by the prosecutor's failure to order an atomic absorption gunpowder residue analysis test. But, as this Court has stated, "[w]here . . . the state has failed to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the result of which might have exonerated the defendant, the failure to preserve potentially useful evidence does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the police." *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989); see also *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993).

Here, the police prepared an atomic absorption gunpowder residue analysis kit on defendant, however, they decided not to submit the kit to the state for analysis. Sergeant Fray, the officer in charge, testified that it would cost several thousand dollars to have the kit analyzed and that the analysis was not ordered in this case because it was not necessary due to the corroboration of eyewitness testimony regarding defendant discharging the firearm. Furthermore, Sergeant Fray testified that the only spent shell in the motel was found in the gun located under defendant's forearm. "Circumstantial evidence and reasonable inferences arising there from can constitute satisfactory proof of the elements of a crime." *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

We find that there was enough evidence for a jury to find that defendant discharged a firearm during the robbery without having an atomic absorption gunpowder residue analysis

performed. Taking into account the expense of the procedure, the direct testimony, and the circumstantial evidence regarding defendant discharging the firearm, neither the police nor the prosecutor acted in bad faith in failing to have the kit analyzed. Moreover, defendant has no due process right to compel the police to test his hands for gunpowder residue, as the police are not required to seek and find exculpatory evidence. *People v Miller*, 211 Mich App 30, 43; 535 NW2d 518 (1995). Because neither the police nor the prosecutor acted in bad faith, and because the police are not required to conduct gun powder residue tests, *Miller, supra* at 43, defendant has failed to show a plain error affecting his substantial rights. *Carines, supra* at 763.

Defendant's fourth issue is that his Sixth Amendment right of confrontation was violated when Sergeant Fray was permitted to testify regarding the results of the fingerprint test and the atomic absorption gunpowder residue analysis test, without having personal knowledge of either. We disagree.

Defendant failed to properly preserve this issue for appeal, as he did not object to Sergeant Fray's alleged lack of personal knowledge during his testimony at trial. Therefore, we review this constitutional unpreserved issue for a plain error affecting defendant's substantial rights. *Carines, supra* at 763.

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." MRE 602. The prosecutor neither offered Sergeant Fray as an expert regarding the tests nor tried to qualify him as an expert pursuant to MRE 702. Thus, MRE 701 limited Sergeant Fray's opinion testimony to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

Sergeant Fray was the officer in charge in this case. And, Sergeant Fray testified that, as part of his duties as the officer in charge, he collects and assesses all reports made by the officers who worked on the case. Sergeant Fray explained that his duties also require him to review any weapons recovered to determine whether they should be tested for physical evidence. Sergeant Fray testified that he requested that an attempt be made to lift fingerprints from the weapons in this case and that the results came back negative. Sergeant Fray further testified that the police reports in this case noted that defendant's hands were swabbed for gunpowder residue. Sergeant Fray noted, however, that the swab was not sent in for processing.

Sergeant Fray is the officer in charge and because his testimony reflects that he reviewed the police reports in this case, we find that Sergeant Fray's testimony is sufficient to support a finding that he had personal knowledge regarding the fingerprint test performed on the gun found under defendant's forearm and regarding whether an atomic absorption gunpowder residue analysis test was performed on defendant. Furthermore, the prosecutor's questioning regarding the fact that fingerprints are rarely lifted off the surface of firearms appeared to be within Sergeant Fray's knowledge and experience as a detective. Sergeant Fray's answer to the question was likely to aid the jury in comprehending why certain surfaces may or may not yield identifiable fingerprints when touched. A "lay witness generally may testify to something he knows and that does not require expert testimony to establish . . . ." *Howard v Feld*, 100 Mich App 271, 273; 298 NW2d 722 (1980). In any event, the fingerprint test came back negative and the atomic absorption gunpowder residue swab was not submitted for analysis. Defendant has, thus, failed to show that he was prejudiced by Sergeant Fray's testimony regarding test results,

when one result came back negative and the other was not submitted for analysis. See *Carines*, *supra* at 763.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Christopher M. Murray